

Dec 31, 2019

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

JAMES O.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:19-cv-03118-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 14, 15

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 6. The Court, having reviewed the administrative record and the parties' briefing,
2 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
3 motion, ECF No. 14, and denies Defendant's motion, ECF No. 15.

4 **JURISDICTION**

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

6 **STANDARD OF REVIEW**

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within
11 the meaning of the Social Security Act. First, the claimant must be "unable to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be
16 "of such severity that he is not only unable to do his previous work[,] but cannot,
17 considering his age, education, and work experience, engage in any other kind of
18 substantial gainful work which exists in the national economy." 42 U.S.C. §
19 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
3 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
4 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial
5 gainful activity," the Commissioner must find that the claimant is not disabled. 20
6 C.F.R. § 416.920(b).

7 If the claimant is not engaged in substantial gainful activity, the analysis
8 proceeds to step two. At this step, the Commissioner considers the severity of the
9 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
10 "any impairment or combination of impairments which significantly limits [his or
11 her] physical or mental ability to do basic work activities," the analysis proceeds to
12 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy
13 this severity threshold, however, the Commissioner must find that the claimant is
14 not disabled. 20 C.F.R. § 416.920(c).

15 At step three, the Commissioner compares the claimant's impairment to
16 severe impairments recognized by the Commissioner to be so severe as to preclude
17 a person from engaging in substantial gainful activity. 20 C.F.R. §
18 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
19 enumerated impairments, the Commissioner must find the claimant disabled and
20 award benefits. 20 C.F.R. § 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
6 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

7 At step four, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing work that he or she has performed in
9 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
10 capable of performing past relevant work, the Commissioner must find that the
11 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
12 performing such work, the analysis proceeds to step five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
16 must also consider vocational factors such as the claimant's age, education and
17 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
18 adjusting to other work, the Commissioner must find that the claimant is not
19 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
20

1 other work, analysis concludes with a finding that the claimant is disabled and is
2 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
6 capable of performing other work; and (2) such work “exists in significant
7 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
8 700 F.3d 386, 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 On April 14, 2015, Plaintiff applied for Title XVI supplemental security
11 income benefits alleging a disability onset date of January 1, 2015. Tr. 230-37.
12 The application was denied initially, and on reconsideration. Tr. 97-105; Tr. 110-
13 20. Plaintiff appeared before an administrative law judge (ALJ) on May 15, 2018.
14 Tr. 36-65. On June 20, 2018, the ALJ denied Plaintiff’s claim. Tr. 12-31.

15 At step one of the sequential evaluation process, the ALJ found Plaintiff has
16 not engaged in substantial gainful activity since April 14, 2015. Tr. 17. At step
17 two, the ALJ found that Plaintiff has the following severe impairments: diabetes
18 mellitus with associated diabetes nephropathy. *Id.*

19 At step three, the ALJ found Plaintiff does not have an impairment or
20 combination of impairments that meets or medically equals the severity of a listed

1 impairment. Tr. 18. The ALJ then concluded that Plaintiff has the RFC to perform
2 light work with the following limitations:

3 [Plaintiff] can lift and carry 20 lbs. occasionally and 10 lbs.
4 frequently, and can sit, stand and walk with no restriction. He can do
5 no climbing of ladders, ropes or scaffolds. He can frequently climb
6 stairs and ramps. He can do no working at exposed heights, no
working heavy equipment, and otherwise he can have occasional
exposure to hazards. He can have occasional exposure to extreme
cold or to extreme heat.

7 Tr. 19.

8 At step four, the ALJ found Plaintiff is unable to perform any of his past
9 relevant work. Tr. 24. At step five, the ALJ found that, considering Plaintiff's
10 age, education, work experience, RFC, and testimony from the vocational expert,
11 there were jobs that existed in significant numbers in the national economy that
12 Plaintiff could perform, such as cashier, counter clerk, and small products
13 assembler. Tr. 25. Therefore, the ALJ concluded Plaintiff was not under a
14 disability, as defined in the Social Security Act, from the date of the application
15 though the date of the decision. *Id.*

16 On April 1, 2019, the Appeals Council denied review of the ALJ's decision,
17 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
18 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner's final decision denying
3 him supplemental security income benefits under Title XVI of the Social Security
4 Act. Plaintiff raises the following issues for review:

- 5 1. Whether the ALJ properly evaluated the medical opinion evidence;
6 2. Whether the ALJ conducted a proper step-three analysis; and
7 3. Whether the ALJ properly evaluated Plaintiff's symptom claims.

8 ECF No. 14 at 2.

9 **DISCUSSION**

10 **A. Medical Opinion Evidence**

11 Plaintiff challenges the ALJ's evaluation of the opinions of Dr. Gary
12 Treece, Mr. Benjamin Rodriguez, PA-C, and Mr. Joseph Mason, PA-C. ECF No.
13 14 at 7-15.

14 There are three types of physicians: "(1) those who treat the claimant
15 (treating physicians); (2) those who examine but do not treat the claimant
16 (examining physicians); and (3) those who neither examine nor treat the claimant
17 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."
18 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
19 Generally, a treating physician's opinion carries more weight than an examining
20 physician's, and an examining physician's opinion carries more weight than a

1 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight
2 to opinions that are explained than to those that are not, and to the opinions of
3 specialists concerning matters relating to their specialty over that of
4 nonspecialists." *Id.* (citations omitted).

5 If a treating or examining physician's opinion is uncontradicted, the ALJ
6 may reject it only by offering "clear and convincing reasons that are supported by
7 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
8 "However, the ALJ need not accept the opinion of any physician, including a
9 treating physician, if that opinion is brief, conclusory and inadequately supported
10 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
11 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
12 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
13 may only reject it by providing specific and legitimate reasons that are supported
14 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
15 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may
16 serve as substantial evidence if it is supported by other independent evidence in the
17 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

18 "Only physicians and certain other qualified specialists are considered
19 '[a]cceptable medical sources.'" *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir.
20 2014)(alteration in original); see 20 C.F.R. § 416.913(a), (e); SSR 06-03p

1 (Acceptable medical sources include, for example, licensed physicians and
2 psychologists, while other nonspecified medical providers are considered “other
3 sources.”).³ However, an ALJ is required to consider evidence from non-
4 acceptable medical sources. 20 C.F.R. § 416.913(d).⁴ An ALJ may reject the
5 opinion of a non-acceptable medical source by giving reasons germane to the
6 opinion. *Ghanim*, 763 F.3d at 1161.

7 *1. Dr. Treece and Mr. Rodriguez*

8 Dr. Treece and Mr. Rodriguez provided a joint opinion on Plaintiff’s
9 functioning on March 28, 2016. Tr. 594-95. They opined Plaintiff needs to lie
10 down during the day for one to one and a half hours, and opined Plaintiff would
11 miss four or more days in a month if he were to try to work full-time. *Id.* They
12 also opined that Plaintiff working would cause his condition to deteriorate. *Id.*
13 The ALJ gave the opinion “some weight.” Tr. 22. As the opinion was signed by
14

15 ³ The definition of acceptable medical sources was modified for claims filed after
16 March 27, 2017. 20 C.F.R. § 416.902. The Court applies the regulation in effect
17 at the time of Plaintiff’s filing.

18 ⁴ The regulation that requires an ALJ consider opinions from non-acceptable
19 medical sources is found at 20 C.F.R. § 416.927(f) for claims filed after March 27,
20 2017. The Court applies the regulation in effect at the time of Plaintiff’s filing.

1 an acceptable medical source, but was contradicted, the ALJ was required to give
2 specific and legitimate reasons to reject the opinion. *See Bayliss*, 427 F.3d at 1216.

3 First, the ALJ reasoned Plaintiff's activities of daily living were inconsistent
4 with the opinion. Tr. 22. An ALJ may discount a medical source opinion to the
5 extent it conflicts with the claimant's daily activities. *Morgan v. Comm'r of Soc.*
6 *Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999). The ability to care for young
7 children without help has been considered an activity that may undermine claims
8 of totally disabling pain. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
9 However, an ALJ must make specific findings before relying on childcare as an
10 activity inconsistent with disabling limitations. *Trevizo v. Berryhill*, 871 F.3d 664,
11 675-76 (9th Cir. 2017). Here, the ALJ found that Plaintiff does some dog walking,
12 provides daily transportation for his daughter to school, independently attends his
13 own appointments, is able to drive and use public transportation, and grocery shops
14 a couple times per month. Tr. 22 (citing Tr. 56, 57, 292, 303). The ALJ reasoned
15 these activities were more consistent with an ability to perform light work than
16 with the limitations indicated in the providers' opinion. Tr. 22.

17 Plaintiff argues the cited activities are not inconsistent with Plaintiff's
18 reports and the activities are not indicative of an ability to perform full-time work.
19 ECF No. 14 at 10-11. Plaintiff testified he spends a lot of time laying or sitting
20 down but when he does get up, he sometimes takes his daughter's dog for a walk

1 but stated “we don’t get real far.” Tr. 56-57. Plaintiff reported driving his
2 daughter to and from school, but there is no further information regarding how
3 long the drive is or any additional care he provides for her. Tr. 292. He also
4 reported attending doctor’s appointments every couple of weeks. *Id.* Plaintiff’s
5 mother stated Plaintiff spends most of his time sleeping or laying down and he has
6 difficulty with personal care due to fatigue. Tr. 300-01. She stated he does chores
7 every couple of months, Tr. 302, and he drives only when needed, Tr. 303. She
8 stated it takes him “a long time” to get his shopping done when he goes on a
9 shopping trip a couple times per month. *Id.* Plaintiff’s mother helps care for
10 Plaintiff’s child, and reported she makes the meals and handles the household
11 cleaning, while Plaintiff does things like watches to make sure his daughter
12 brushes her teeth. Tr. 301.

13 The ALJ did not identify any activities that are inconsistent with an inability
14 to sustain full-time work or inconsistent with Plaintiff’s allegations of disabling
15 limitations. While the ALJ noted Plaintiff’s ability to provide transportation for his
16 daughter, there is no indication that Plaintiff provides any physical assistance to his
17 daughter nor did the ALJ make any findings regarding the specific nature of the
18 child care provided that is inconsistent with Plaintiff’s allegations of disabling
19 limitations. The noted daily activities were not sufficient to serve as a specific and
20 legitimate reason to reject the opinion.

1 Second, the ALJ reasoned the limited number of visits with the providers
2 lessened the weight owed to the opinion. Tr. 22. The number of visits a claimant
3 had with a particular provider is a relevant factor in assigning weight to an opinion.
4 20 C.F.R. § 416.927(c). The regulations direct that all opinions, including the
5 opinions of examining providers, should be considered. 20 C.F.R. § 416.927(b),
6 (c). The ALJ reasoned the records only demonstrated Plaintiff had seen the
7 providers for a total of nine months at the time the opinion was written, as Dr.
8 Treece saw Plaintiff in May 2015 and Mr. Rodriguez saw Plaintiff once in March
9 2016. Tr. 22 (citing Tr. 594). The ALJ noted there was no indication there were
10 any appointments in between those dates, demonstrating limited treatment. Tr. 22.
11 As an initial matter, the ALJ's conclusion is factually inaccurate. The
12 questionnaire asked the providers for the first and last date they saw Plaintiff and
13 did not ask the number of times they had seen him. Tr. 594. The underlying
14 medical records indicate Plaintiff had a follow-up with Dr. Treece in September
15 2015. Tr. 565, 578. Mr. Rodriguez also saw Plaintiff in June 2015. Tr. 578.
16 Plaintiff continued treatment with the providers after the opinion was rendered. Tr.
17 725. Thus, the ALJ's finding that each provider may have seen Plaintiff only once
18 is not supported by the evidence. Moreover, the ALJ's reasoning that the opinion
19 should be afforded less weight as the providers treated Plaintiff for only nine
20 months before rendering the opinion is inconsistent with the ALJ affording

1 substantial weight to the opinions of Dr. Emma Billings and Dr. Jay Toews, who
2 saw Plaintiff only once as examining sources. Tr. 22-23. This was not a specific
3 and legitimate reason to reject the opinion.

4 Third, the ALJ reasoned the providers appeared to lack knowledge of
5 Plaintiff's work history. Tr. 22. The extent to which a medical source is "familiar
6 with the other information in [the claimant's] case record" is relevant in assessing
7 the weight of that source's medical opinion. *See* 20 C.F.R. § 416.927(c)(6).
8 However, here, there is no indication in the record whether the providers were
9 familiar with Plaintiff's work history. The providers' treatment records indicate
10 Plaintiff was unemployed at the time they were treating him in 2015, Tr. 564, and
11 later his occupation is listed as "disabled," Tr. 806, but there is no additional
12 information about his work history in the providers' records.

13 Further, the ALJ's reasoning appears based on the belief that the providers
14 were unaware of Plaintiff's lack of recent work history, even before the alleged
15 onset date, and that if the providers were aware of Plaintiff's work history, it would
16 have changed their opinion. This reasoning assumes Plaintiff's work history
17 would impact the opinion. However, the providers cited to Plaintiff's A1C (a
18 blood test regarding blood glucose, Tr. 571), need for five insulin injections per
19 day, and physical symptoms that are accompanied by objective evidence including
20 nephrotic levels of proteinuria, as evidence supporting the opinion. Tr. 494-95.

1 The ALJ does not explain how the Plaintiff's work history may impact the
2 providers' opinion about Plaintiff's ability to function as of the date the opinion
3 was rendered. This was not a specific and legitimate reason to reject the opinion.

4 As the ALJ did not articulate specific and legitimate reasons, supported by
5 substantial evidence, to reject the opinions, the ALJ erred in his analysis.

6 *2. Mr. Mason*

7 In February 2015, Mr. Mason opined Plaintiff is unable to participate in
8 work activities, due to his limitations. Tr. 497. He opined Plaintiff's diabetes
9 requires constant monitoring, he has difficulty concentrating and recalling
10 information, he can sleep for days at a time, his pain affects his ability to walk and
11 stand for long periods, and he may have difficulty learning new job skills. *Id.* He
12 also opined Plaintiff was limited to sedentary work. Tr. 499. The ALJ gave Mr.
13 Mason's opinion little weight. Tr. 22. As Mr. Mason is not an acceptable medical
14 source, the ALJ was required to give a germane reason to reject the opinion. *See*
15 *Ghanim*, 763 F.3d at 1161.

16 First, the ALJ found Mr. Mason's opinion was inconsistent with the
17 objective medical evidence. Tr. 22. An ALJ is not obliged to credit opinions that
18 are unsupported by the medical source's own data and/or contradicted by the
19 opinions of other sources. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir.
20 2008). Here, the ALJ found Mr. Mason's opinion was inconsistent with the

1 medical findings of Dr. Sloop, Dr. Licht and Dr. Hopp. Tr. 22. A few weeks after
2 Mr. Mason gave his opinion, Dr. Sloop found Plaintiff had only mild peripheral
3 neuropathy, and that Plaintiff had an “[e]xcellent, essentially complete recovery”
4 from his hospitalization. Tr. 20-21 (citing Tr. 598). Dr. Sloop observed Plaintiff
5 told exaggerated stories and had some bizarre ideas, but Plaintiff’s neurologic
6 examination was “completely normal” besides the two points missed for recall at
7 five minutes. Tr. 596-97. In November 2016, Dr. Licht noted Plaintiff reported he
8 was doing well and denied any problems with his condition. Tr. 20 (citing Tr.
9 703). At the November 2016 appointment with Dr. Licht, Plaintiff’s physical
10 examination was normal, though it is unclear if he was experiencing edema as the
11 note indicates there “is no 3+ edema.” Tr. 704. In June 2017, Dr. Hopp found
12 Plaintiff’s retinopathy was mild, and later records noted improvement in his vision.
13 Tr. 21 (citing Tr. 610-11). As discussed above, while Plaintiff had periods of more
14 severe symptoms during periods of treatment noncompliance, he had significant
15 improvement when complying with treatment. This was a germane reason to reject
16 Mr. Mason’s opinion.

17 Second, the ALJ found Mr. Mason’s opinion was inconsistent with
18 Plaintiff’s activities of daily living. Tr. 22. An ALJ may discount a medical
19 source opinion to the extent it conflicts with the claimant’s daily activities.
20 *Morgan*, 169 F.3d at 601-02. As discussed *supra*, the ALJ’s analysis of Plaintiff’s

1 activities was flawed. The ALJ did not add any further analysis of Plaintiff's
2 activities in assessing Mr. Mason's opinion. Given the case is being remanded for
3 reevaluation of the other opinions, the ALJ is directed to reevaluate all of the
4 medical evidence.

5 **B. Step Three**

6 Plaintiff contends that the ALJ erred by finding that Plaintiff's diabetes
7 mellitus with associated nephropathy did not meet Listing 6.06. ECF No. 14 at 2.
8 At step three, the ALJ must determine if a claimant's impairments meet or equal a
9 listed impairment. 20 C.F.R. § 416.920(a)(4)(iii). The Listing of Impairments
10 "describes each of the major body systems impairments [which are considered]
11 severe enough to prevent an individual from doing any gainful activity, regardless
12 of his or her age, education or work experience." 20 C.F.R. § 416.925. "Listed
13 impairments are purposefully set at a high level of severity because 'the listings
14 were designed to operate as a presumption of disability that makes further inquiry
15 unnecessary.'" *Kennedy v. Colvin*, 758 F.3d 1172, 1176 (9th Cir. 2013) (citing
16 *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990)). "Listed impairments set such strict
17 standards because they automatically end the five-step inquiry, before residual
18 functional capacity is even considered." *Kennedy*, 758 F.3d at 1176. If a claimant
19 meets the listed criteria for disability, he will be found to be disabled. 20 C.F.R. §
20 416.920(a)(4)(iii).

1 “To *meet* a listed impairment, a claimant must establish that he or she meets
2 each characteristic of a listed impairment relevant to his or her claim.” *Tackett*,
3 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). “To *equal* a
4 listed impairment, a claimant must establish symptoms, signs and laboratory
5 findings ‘at least equal in severity and duration’ to the characteristics of a relevant
6 listed impairment” *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting
7 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a). “If a claimant suffers from
8 multiple impairments and none of them individually meets or equals a listed
9 impairment, the collective symptoms, signs and laboratory findings of all of the
10 claimant’s impairments will be evaluated to determine whether they meet or equal
11 the characteristics of any relevant listed impairment.” *Tackett*, 180 F.3d at 1099.
12 However, “ ‘[m]edical equivalence must be based on medical findings,’ and “[a]
13 generalized assertion of functional problems is not enough to establish disability at
14 step three.’ ” *Id.* at 1100 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. §
15 416.926(a).

16 The claimant bears the burden of establishing his impairment (or
17 combination of impairments) meets or equals the criteria of a listed impairments.
18 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). “An adjudicator’s
19 articulation of the reason(s) why the individual is or is not disabled at a later step in
20 the sequential evaluation process will provide rationale that is sufficient for a

1 subsequent reviewer or court to determine the basis for the finding about medical
2 equivalence at step 3.” Social Security Ruling (SSR) 17-2P, 2017 WL 3928306, at
3 *4 (effective March 27, 2017).

4 Here, the ALJ found that Plaintiff’s impairments and combinations of
5 impairments did not meet or equal any listings, including Listings 6.05, 9.00 and
6 2.02. Tr. 18. The ALJ did not consider Listing 6.06, the listing for nephrotic
7 syndrome. To satisfy Listing 6.06, the claimant must satisfy both the Paragraph A
8 and Paragraph B criteria. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 6.06.
9 Paragraph A requires laboratory findings, documented on at least two occasions at
10 least 90 days apart during a consecutive 12-month period, showing either: 1)
11 Proteinuria of 10.0 g or greater per 24 hours; or 2) Serum albumin of 3.0 g/dL or
12 less, and either: a) Proteinuria of 3.5 g or greater per 24 hours; or b) Urine total-
13 protein-to-creatinine ratio of 3.5 or greater. *Id.* Paragraph B requires anasarca
14 persisting for at least 90 days despite prescribed treatment. *Id.*

15 Plaintiff contends he satisfied the criteria of Paragraph (A)(2)(a) and (b) of
16 the listing because he had a serum albumin of 3.0 g/dL or less and proteinuria of
17 3.5 g or greater in February 2015 and November 2015, as well as serum albumin of
18 3.0 g/dL or less and a urine total-protein-to-creatinine ratio of 3.5 or greater in
19 March 2016 and May 2016. ECF No. 14 at 5. Plaintiff argues he meets the
20

1 Paragraph B criteria of the listing due to ongoing edema beginning in January
2 2015. *Id.* at 6.

3 Defendant argues Plaintiff has not met the burden of demonstrating he meets
4 the requirements of Listing 6.06. ECF No. 15 at 3-5. While Defendant does not
5 challenge the assertion that Plaintiff meets the Paragraph A criteria, Defendant
6 argues Plaintiff's edema does not rise to the level of anasarca, thus not satisfying
7 the Paragraph B criteria. *Id.* Though the ALJ did not address Listing 6.06,
8 Defendant argues the ALJ's analysis of Listing 6.05 was sufficient to also act as an
9 analysis for Listing 6.06. *Id.* at 5.

10 Here, the record is not clear as to whether Plaintiff satisfies the Paragraph B
11 criteria of the listing. It is the ALJ's role to consider the evidence, state an
12 interpretation thereof, and make findings accordingly. *Tommasetti*, 533 F.3d at
13 1041. As the case is being remanded on other grounds, on remand, the ALJ is
14 instructed to reconsider the relevant listings, including Listing 6.06, and to call a
15 medical expert if necessary to address whether Plaintiff's conditions meet or equal
16 a listing.

17 **C. Plaintiff's Symptom Claims**

18 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons to
19 discredit his symptom claims. ECF No. 14 at 15-21. An ALJ engages in a two-
20 step analysis to determine whether to discount a claimant's testimony regarding

1 subjective symptoms.⁵ SSR 16–3p, 2016 WL 1119029, at *2. “First, the ALJ
2 must determine whether there is objective medical evidence of an underlying
3 impairment which could reasonably be expected to produce the pain or other
4 symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation marks omitted). “The
5 claimant is not required to show that [the claimant’s] impairment could reasonably
6 be expected to cause the severity of the symptom [the claimant] has alleged; [the
7 claimant] need only show that it could reasonably have caused some degree of the
8 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

9 Second, “[i]f the claimant meets the first test and there is no evidence of
10 malingering, the ALJ can only reject the claimant’s testimony about the severity of
11 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
12 rejection.” *Ghanim*, 763 F.3d at 1163 (citations omitted). General findings are
13 insufficient; rather, the ALJ must identify what symptom claims are being
14 discounted and what evidence undermines these claims. *Id.* (quoting *Lester*, 81
15 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the
16

17 ⁵ At the time of the ALJ’s decision, the regulation that governed the evaluation of
18 symptom claims was SSR 16-3p, which superseded SSR 96-7p effective March 24,
19 2016. SSR 16-3p; Titles II and XVI: Evaluation of Symptoms in Disability
20 Claims, 81 Fed. Reg. 15776, 15776 (Mar. 24, 2016).

1 ALJ to sufficiently explain why it discounted claimant's symptom claims)). "The
2 clear and convincing [evidence] standard is the most demanding required in Social
3 Security cases." *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm'r of Soc.*
4 *Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

5 Factors to be considered in evaluating the intensity, persistence, and limiting
6 effects of a claimant's symptoms include: 1) daily activities; 2) the location,
7 duration, frequency, and intensity of pain or other symptoms; 3) factors that
8 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
9 side effects of any medication an individual takes or has taken to alleviate pain or
10 other symptoms; 5) treatment, other than medication, an individual receives or has
11 received for relief of pain or other symptoms; 6) any measures other than treatment
12 an individual uses or has used to relieve pain or other symptoms; and 7) any other
13 factors concerning an individual's functional limitations and restrictions due to
14 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
15 416.929 (c). The ALJ is instructed to "consider all of the evidence in an
16 individual's record," "to determine how symptoms limit ability to perform work-
17 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

18 The ALJ found that Plaintiff's medically determinable impairments could
19 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
20

1 statements concerning the intensity, persistence, and limiting effects of his
2 symptoms were not entirely consistent with the evidence. Tr. 19.

3 First, the ALJ found the objective evidence is inconsistent with Plaintiff's
4 allegations of severe mental impairments and disabling physical impairments. Tr.
5 20-21. An ALJ may not discredit a claimant's symptom testimony and deny
6 benefits solely because the degree of the symptoms alleged is not supported by
7 objective medical evidence. *Rollins*, 261 F.3d at 857; *Bunnell v. Sullivan*, 947 F.2d
8 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989);
9 *Burch*, 400 F.3d at 680. However, the objective medical evidence is a relevant
10 factor, along with the medical source's information about the claimant's pain or
11 other symptoms, in determining the severity of a claimant's symptoms and their
12 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929I(2).

13 The ALJ reasoned the objective evidence, demonstrating Plaintiff's average
14 IQ, and normal mental status exams, did not support Plaintiff's allegations of
15 severe mental impairment. Tr. 20 (citing Tr. 754, 756). Additionally, the objective
16 evidence demonstrated Plaintiff had only mild neuropathy, Tr. 20 (citing Tr. 598),
17 mild diabetic retinopathy with some improvement, Tr. 21 (citing Tr. 610-11), and
18 while he alleges a stroke and anoxia, the records indicate the diagnosis was
19 diabetes with hyperglycemia. Tr. 20 (citing Tr. 437). Plaintiff argues the ALJ's
20 findings were not specific enough, ECF No. 14 at 20, however the ALJ cited to

1 objective evidence showing normal or only mildly abnormal findings for each of
2 Plaintiff's primary symptom complaints. The ALJ's finding was supported by
3 substantial evidence.

4 Second, the ALJ found Plaintiff's activities were inconsistent with his
5 allegations. Tr. 20. The ALJ may consider a claimant's activities that undermine
6 reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a substantial
7 part of the day engaged in pursuits involving the performance of exertional or non-
8 exertional functions, the ALJ may find these activities inconsistent with the
9 reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*, 674 F.3d at 1113.
10 "While a claimant need not vegetate in a dark room in order to be eligible for
11 benefits, the ALJ may discount a claimant's symptom claims when the claimant
12 reports participation in everyday activities indicating capacities that are
13 transferable to a work setting" or when activities "contradict claims of a totally
14 debilitating impairment." *Molina*, 674 F.3d at 1112-13. The ability to care for
15 others without help has been considered an activity that may undermine claims of
16 totally disabling pain. *Rollins*, 261 F.3d at 857. However, if the care activities are
17 to serve as a basis for the ALJ to discredit the Plaintiff's symptom claims, the
18 record must identify the nature, scope, and duration of the care involved and this
19 care must be "hands on" rather than a "one-off" care activity. *Trevizo*, 871 F.3d at
20 675-76.

1 As discussed *supra*, the ALJ's analysis of Plaintiff's activities was flawed.
2 While the ALJ cited to activities as inconsistent with Plaintiff's allegations, a
3 review of the record indicates the cited activities are not inconsistent.
4 Nevertheless, this error is harmless where the ALJ lists additional reasons,
5 supported by substantial evidence, for discrediting Plaintiff's symptom complaints.
6 *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir.
7 2008); *Molina*, 674 F.3d at 1115 ("[S]everal of our cases have held that an ALJ's
8 error was harmless where the ALJ provided one or more invalid reasons for
9 disbelieving a claimant's testimony, but also provided valid reasons that were
10 supported by the record."); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190,
11 1197 (9th Cir. 2004) (holding that any error the ALJ committed in asserting one
12 impermissible reason for claimant's lack of credibility did not negate the validity
13 of the ALJ's ultimate conclusion that the claimant's testimony was not credible).

14 Third, the ALJ found Plaintiff's non-compliance inconsistent with his
15 allegations. Tr. 20-21. "A claimant's subjective symptom testimony may be
16 undermined by an unexplained, or inadequately explained, failure to . . . follow a
17 prescribed course of treatment." *Trevizo*, 871 F.3d at 679 (citations omitted).
18 Failure to assert a reason for not following treatment "can cast doubt on the
19 sincerity of the claimant's pain testimony." *Id.* The ALJ found Plaintiff did not
20 comply with his provider's recommendations. Tr. 21. Plaintiff did not follow the

1 low-cholesterol and low-sugar diet needed to manage his diabetes and high LDL
2 and triglyceride levels. *Id.* (citing Tr. 699). When Plaintiff's uncontrolled diabetes
3 lead to a hospitalization, it was in the context of Plaintiff not taking his insulin, and
4 his compliance with taking insulin has been noted as "erratic." Tr. 20 (citing Tr.
5 752); Tr. 437. While Plaintiff did not challenge this reason, the Court finds it is a
6 clear and convincing reason, supported by substantial evidence, to reject plaintiff's
7 claims. The records demonstrate Plaintiff did not follow providers'
8 recommendations on multiple occasions. A provider noted Plaintiff's sleep apnea
9 may be contributing to Plaintiff's edema, Tr. 706, but records indicate Plaintiff did
10 not follow up to have a sleep study, Tr. 840, and he was not using a CPAP, Tr.
11 839. Plaintiff was also instructed to elevate his feet to help with his edema, but
12 Plaintiff admitted to not elevating his feet. Tr. 564. Though a provider suggested
13 medication to protect Plaintiff's kidneys, Plaintiff would not commit to taking
14 medication. *Id.*

15 Fourth, the ALJ found Plaintiff's symptom embellishment undermined his
16 claims. Tr. 21. Evidence of being motivated by secondary gain is sufficient to
17 support an ALJ's rejection of testimony evidence. *See Matney ex rel. Matney*, 981
18 F.2d at 1020. Therefore, the tendency to exaggerate or engage in manipulative
19 conduct during the process is a permissible reason to discount the credibility of the
20

1 claimant's reported symptoms. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th
2 Cir. 2001).

3 The ALJ found Dr. Sloop noted Plaintiff engaged in exaggeration of his
4 symptoms/issues, and Dr. Sloop reasoned Plaintiff's reported stroke was unlikely
5 given his essentially complete recovery. Tr. 21 (citing Tr. 597-98). Plaintiff
6 argues that the exaggerations were unrelated to his allegations, as they related to
7 issues prior to the alleged onset date, and argues his reported stroke and anoxic
8 brain injury were potential diagnoses, though they were ruled out. ECF No. 14 at
9 18-19. However, Plaintiff alleges mental impairment due to a brain injury. Tr.
10 248. He described issues to Dr. Sloop that were "not genuine or possible to
11 occur." Tr. 596. Despite the allegation of severe mental impairment, Plaintiff
12 scored a 36 out of 38 points on his neurologic examination. Tr. 597. On this
13 record, the ALJ reasonably concluded that Plaintiff exaggerated his symptoms.
14 This finding is supported by substantial evidence and was a clear and convincing
15 reason to discount Plaintiff's symptoms complaints.

16 Fifth, the ALJ found Plaintiff's work history indicated Plaintiff did not work
17 for reasons other than his disability. Tr. 21. When considering a claimant's
18 contention that he cannot work because of his impairments, it is appropriate to
19 consider whether the claimant has not worked for reasons unrelated to his alleged
20 disability. *See Tommasetti*, 533 F.3d at 1040; *Bruton v. Massanari*, 268 F.3d 824,

1 828 (9th Cir. 2001) (sufficient reasons for disregarding subjective testimony
2 include stopping work for nonmedical reasons and failure to seek care for allegedly
3 disabling condition at the time claimant stopped work).

4 The ALJ found Plaintiff had no earnings for 10 of the 15 years prior to his
5 alleged onset date, and the other five of the 15 years, he did not work at the
6 substantial gainful activity level. Tr. 21. The ALJ noted Plaintiff had also reported
7 staying home to watch his daughter. *Id.* The ALJ reasoned Plaintiff's choice of
8 not working is not related to a disability. *Id.* This reason, along with the
9 inconsistent objective evidence, Plaintiff's non-compliance with treatment, and
10 symptom exaggeration, provided clear and convincing reasons, supported by
11 substantial evidence, to reject Plaintiff's symptom claims.

12 **D. Remedy**

13 Plaintiff urges this Court to remand for an immediate award of benefits.
14 ECF No. 14 at 14. "The decision whether to remand a case for additional
15 evidence, or simply to award benefits is within the discretion of the court."
16 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*,
17 761 F.2d 530 (9th Cir. 1985)). When the Court reverses an ALJ's decision for
18 error, the Court "ordinarily must remand to the agency for further proceedings."
19 *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379
20 F.3d 587, 595 (9th Cir. 2004) ("the proper course, except in rare circumstances, is

1 to remand to the agency for additional investigation or explanation”); *Treichler v.*
2 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a
3 number of Social Security cases, the Ninth Circuit has “stated or implied that it
4 would be an abuse of discretion for a district court not to remand for an award of
5 benefits” when three conditions are met. *Garrison v. Colvin*, 759 F.3d 995, 1020
6 (9th Cir. 2014) (citations omitted). Under the credit-as-true rule, where (1) the
7 record has been fully developed and further administrative proceedings would
8 serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons
9 for rejecting evidence, whether claimant testimony or medical opinion; and (3) if
10 the improperly discredited evidence were credited as true, the ALJ would be
11 required to find the claimant disabled on remand, the Court will remand for an
12 award of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even
13 where the three prongs have been satisfied, the Court will not remand for
14 immediate payment of benefits if “the record as a whole creates serious doubt that
15 a claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

16 As discussed above, Plaintiff has had periods of non-compliance with
17 treatment. Tr. 437, 564. Further proceedings are necessary to resolve the conflicts
18 in the evidence. On remand, the ALJ is instructed to reconsider the opinion and
19 either incorporate the limitations into the RFC or give specific and legitimate
20 reasons to reject the opinion.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court concludes the
3 ALJ's decision is not supported by substantial evidence and is not free of harmful
4 legal error. Accordingly, **IT IS HEREBY ORDERED:**

5 1. The District Court Executive is directed to substitute Andrew M. Saul as
6 the Defendant and update the docket sheet.

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**.

8 3. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

9 4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
10 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
11 Security for further proceedings consistent with this recommendation pursuant to
12 sentence four of 42 U.S.C. § 405(g).

13 The District Court Executive is directed to file this Order, provide copies to
14 counsel, and **CLOSE THE FILE**.

15 DATED December 31, 2019.

16 *s/Mary K. Dimke*
17 MARY K. DIMKE
18 UNITED STATES MAGISTRATE JUDGE
19
20